Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

79-1019

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

JOHN M. RANEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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IN THE SUPREME COURT OF THE UNITED STATES

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No. _____

JOHN M. RANEY,
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UNITED STATES OF AMERICA,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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I. INTRODUCTION

By this petition for a writ of certiorari, the petitioner, John M. Raney, is asking this Court to review the decision of the United States Court of Appeals for the Seventh Circuit, which affirmed the judgment of conviction entered in the United States District Court for the Central District of Illinois. Petitioner was convicted of, and sentenced to a term of ten years' imprisonment for, various counts of mail fraud, wire fraud, bankruptcy fraud, and conspiracy.

In this petition, the petitioner will be referred to either as "petitioner" or by name. The respondent will be referred to either as "respondent" or as "the United States." The United States Court of Appeals for the Seventh Circuit will be referred to as "the appellate court." The United States District Court for the Central District of Illinois will be referred to as "the trial court."

II. OPINIONS BELOW

This was a criminal case in which no opinion was entered by the trial court. The opinion in the appellate court was in the form of an unpublished per curiam order. A copy of that order is attached to this petition as Appendix A.

III. JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

The jury verdict was returned in the trial court on February 1, 1979, and petitioner was sentenced on March 21, 1979.

The order of the appellate court was issued on October 31, 1979. On November 29, 1979, Mr. Justice Stevens extended the term for filing this petition for writ of certiorari to and including December 30, 1979. A copy of the order extending time is attached to this

petition as Appendix B.

IV. QUESTIONS PRESENTED

The questions presented in this petition for writ of certiorari are as follows:

1. Whether petitioner has been denied due process of law since he was precluded at trial from introducing all of the relevant and competent evidence concerning his theory of the case, which theory was that any fraudulent or illegal acts were committed by persons other than him.

2. Whether petitioner has been denied his right of confrontation of the witnesses against him by the ruling of the trial court that defense counsel could not cross-examine witnesses for the United States concerning any area of testimony in which the witness would invoke the privilege against self-incrimination.

3. Whether petitioner has been denied his right to a fair trial by the refusal of the trial court to inquire of the jurors whether they had read any of the newspaper articles concerning the trial which were published during the pendency of the trial, or whether they had watched or listened to any of the local radio or television news broadcasts concerning the trial.

4. Whether petitioner has been punished for exercising his right to trial by his having been

sentenced to a term of imprisonment which was ten times longer than that of his alleged co-conspirator, who entered guilty pleas pursuant to a plea bargain.

5. Whether petitioner was denied his right to a fair trial as the result of all of the errors which were committed by the trial court.

V. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in relevant part, as follows:

> . . . nor shall [any person] be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the Constitution of the United States provides, in relevant part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to be confronted with the witnesses against him . . .

Title 18, United States Code, Section 152, provides, in relevant part, as follows:

. . . . .

> Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers any of his property or the property of such other person or corporation;
>
> . . . . .
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18, United States Code, Section 371, provides, in relevant part, as follows:

> If two or more persons conspire either to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18, United States Code, Section 1341, provides, in relevant part, as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office of authorized depository for mail matter, any

> matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title 18, United States Code, Section 1343, provides, in relevant part, as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, or promises, transmits or causes to be transmitted by means of wire . . . communication in interstate . . . commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

VI. STATEMENT OF THE CASE

During the early months of 1977, John M. Raney and Gerald R. Van Diver formed a business known as Illinois Construction Company as an equal partnership. Mr. Van Diver was to have

the responsibility for construction and advertising, and Mr. Raney the responsibility for sales and administration, in the sales and construction of steel buildings. Negotiations were conducted with a Mr. Orrin Patrick to provide equipment and to work as a sub-contractor erecting buildings which had been sold. Mr. Patrick later became the construction manager for Illinois Construction Company.

In March of 1977, agents for Illinois Construction Company began making sales of buildings while Mr. Van Diver was involved in discussions with various manufacturers concerning an arrangement for the purchase of pre-engineered buildings. The result of these discussions was that Mr. Van Diver and Mr. Raney realized that they had not been charging enough for the buildings which had been sold. It was decided that the only possible way to meet the contracts would be to manufacture themselves the buildings which were sold.

Agreements were then made for Smith Steel Company in Dumas, Arkansas to provide rigid frame trusses and drawings; for McElroy Metal Mill in Clinton, Illinois to provide sheet steel, and for various other suppliers to furnish additional materials necessary to construct a building. However, it was soon

learned that the frames were being incorrectly manufactured by Smith Steel, and the partners decided to manufacture their own frames at a small plant in Mt. Auburn, Illinois.

Within a very short time, the business had expanded to employ nearly sixty people, and it was decided that a corporation should be formed. The incorporation was accomplished on or about June 1, 1977 by Richard A. Hollis, an attorney who also became a shareholder of the new corporation, which was known as Farm Belt Steel Corporation.

Very shortly thereafter, the fabrication plant was moved to a much larger building in Rochester, Illinois, since there were then nearly seventy employees and contracts had been entered for the delivery of numerous buildings.

In fact, during the period beginning in March of 1977, and extending through September 7, 1977, more than 120 buildings were sold. Typically, these were sold with a down payment of one-third of the total price, another one-third was payable upon delivery of the building materials, and the final one-third was to be paid upon completion of the construction.

The problem which arose, however, was that the buildings were being sold much faster than they could be manufactured or delivered. Numerous complaints were received from customers and to try to keep everyone happy the corporation began making partial deliveries of materials and began some trenching operations.

This was not a successful method of dealing with the problem, though, and on September 7, 1977, the corporation was required to file a petition for bankruptcy. At that time, some $300,000 had been collected from customers, but very few buildings had actually been constructed. Nearly half of the customers had received nothing at all.

Shortly before the filing of the bankruptcy petition, Mr. Van Diver and Mr. Hollis had transferred all of their interest in the corporation to Mr. Raney, had taken some of the equipment and supplies of the corporation, and had opened a new business which also sold steel buildings.

On September 22, 1978, an indictment was issued which charged both Mr. Van Diver and Mr. Raney with 43 counts of mail fraud, 13 counts of wire fraud, 5 counts of bankruptcy fraud, and one count of conspiracy to commit mail, wire, and

bankruptcy fraud. Both entered pleas of not guilty to all of these counts.

Pursuant to an agreement reached through plea-bargaining, Mr. Van Diver subsequently changed his plea to guilty to one count of mail fraud and to the conspiracy count. He testified as a witness at the trial of Mr. Raney, which began on January 15, 1979 and continued until February 1, 1979. The jury returned a verdict finding Mr. Raney guilty of 27 of the mail fraud counts, 10 counts of wire fraud, 2 counts of bankruptcy fraud, and of the conspiracy count.

At that trial Mr. Raney's defense and theory of the case was that if any of the activities of his business could be conceived of as fraudulent or criminal, such activities were those of Mr. Van Diver or Mr. Hollis, both of whom had chosen to "bail out" when things became very difficult, leaving him to attempt to rectify what had previously been done. Mr. Raney sought to establish this defense at trial through several avenues which included the cross-examination of Mr. Van Diver and Mr. Hollis, both of whom were called as prosecution witnesses, to show that after leaving Farm Belt Steel Corporation they had formed two other companies

named Midwest Building Systems and TAS Construction, which also sold steel buildings employing the same methods and many of the same personnel as had Farm Belt Steel Corporation. He would have also called as witnesses customers of these new companies to show that Mr. Van Diver and Mr. Hollis were still conducting the same types of activities that they had conducted with Farm Belt Steel Corporation.

The trial court ruled that such evidence was not relevant, however, and refused to admit any of it. The trial court also ruled that since Mr. Van Diver had indicated that he would invoke his privilege against self-incrimination with regard to his activities subsequent to his association with Farm Belt Steel Corporation, defense counsel would not be permitted to inquire about such subsequent activities.

This trial generated a great deal of publicity in the Springfield, Illinois area, and as a result of the publicity during trial, defense counsel moved for a mis-trial and requested that the trial court question each juror concerning his or her exposure to newspaper, television, or radio reports concerning the trial. The trial court refused

to do this. A copy of defendant's motion is attached to this petition as Appendix C.

On February 2, 1979, Mr. Van Diver was sentenced to one year and two days' imprisonment on the conspiracy charge and to five years' probation on the mail fraud charge. On March 21, 1979, John M. Raney was sentenced to ten years' imprisonment.

An appeal was taken and on October 31, 1979, the appellate court issued its order affirming the judgment and sentence of the trial court. Mr. Raney is now petitioning this Court to issue a writ of certiorari to review his conviction.

VII. REASONS FOR GRANTING THE WRIT

A. Petitioner has been denied due process of law by the trial court's refusal to permit him to offer evidence concerning his theory of the case.

As it was stated in the foregoing statement of the case, the theory of Mr. Raney's case was that any fraudulent acts committed with regard to the transactions of Farm Belt Steel Corporation or his other business activities with Gerald Van Diver were the acts of either Mr. Van Diver or of Richard Hollis. To establish this defense, Mr. Raney sought at

trial to introduce evidence that these persons had continued the same business operations through new corporations after having left him to deal with the problems of Farm Belt Steel Corporation. The trial court excluded all such evidence as not relevant.

"Relevant evidence" is defined in Rule 401 of the Federal Rules of Evidence as:

> . . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Relevant evidence is made admissible by Rule 402 of the Federal Rules of Evidence.

It seems to beyond any kind of doubt that a defendant may properly disprove the contention that he is guilty of a crime with which he has been charged by proving that the crime was committed by another. United States v. Robinson, 544 F.2d 110 (2d Cir.), cert. denied 434 U.S. 1050 (1976). Thus, any evidence which would show it to be more or less probable that the acts with which Mr. Raney was charged were committed by others is relevant evidence.

There have been a great number of cases which have held that where a person is charged with defrauding others through a scheme

of making sales through false representations, proof that the same or similar misrepresentations were also made by him or his agents at other times and other places is admissible to help prove such person's guilt. See, e.g., United States v. Krohn, 573 F.2d 1382 (10th Cir.), cert. denied 436 U.S. 949 (1978); United States v. Cobb, 397 F.2d 416 (7th Cir.), cert. denied 393 U.S. 924 (1968).

Based upon the same principles, the few courts which have considered the question have also held that a defendant has the right to show that crimes of a similar nature have been committed by some other person when such other crimes are closely enough connected with the crime with which the defendant has been charged that it might cast doubt on whether the defendant is actually guilty of the crime charged. State v. Harris, 153 Iowa 592, 133 N.W. 1078 (1912); State v. Bock, 229 Minn. 449, 39 N.W.2d 887 (1949).

The importance and relevancy of such evidence is amplified in case such as the one now before the Court. Here, the refusal of the trial court to admit any evidence of the subsequent activities of Mr. Van Diver and Mr. Hollis denied petitioner any opportunity

for his theory of the case to even be presented to the jury.

It would seem that as a part of the minimum requirements of due process of law, as guaranteed by the Fifth Amendment to the United States Constitution, a defendant must be permitted to present evidence concerning any proper theory of the case which he might have. That requirement was put aside in the present case, and petitioner has been grievously injured as a result.

One other basis for the exclusion by the trial court of evidence of such subsequent activities was Mr. Van Diver's indication that he would invoke his privilege against self-incrimination with regard to any questions relating to those activities.

While it has been held that a defendant may be precluded from calling on witness where it is indicated that such witness will refuse to answer questions based upon his privilege against self-incrimination, see, e.g. United States v. Lacouture, 495 F.2d 1237 (5th Cir. 1974); United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973), that situation was not presented in this case. Here, the witnesses were called by the United States and threatened to invoke their

privilege only upon cross-examination.

This Court has established that a defendant's right under the Sixth Amendment to the United States Constitution includes the right to cross-examine such witnesses. Pointer v. Texas, 380 U.S. 400 (1965). As a result, it has been rather uniformly held that a conviction must be reversed where cross-examination of a prosecution witness has been limited based upon the witness having been invoked his privilege against self-incrimination. See, e.g., United States v. Newman, 490 F.2d 139 (3d Cir. 1974); United States v. Cardillo, 316 F.2d 606 (2d Cir.) cert. denied 375 U.S. 822 (1963).

A very pertinent case is United States v. Scott, 511 F.2d 15 (8th Cir.), cert. denied 421 U.S. 1002 (1975), which recognized that a defendant's right of confrontation is violated where the cross-examination of an alleged co-conspirator called as a witness by the prosecution is curtailed because of the witness invoking his privilege against self-incrimination.

The end result of this complete refusal of the trial court to permit petitioner to present his theory of the case has been to deny him any kind of due process of law. By

affirming Mr. Raney's conviction, the trial court has sanctioned such a departure from the accepted and usual course of judicial proceedings by the trial that the exercise of the Court's power of supervision has become necessary. In addition, the order of the appellate court is in direct conflict with such decisions from other circuits as United States v. Scott, 511 F.2d 15 (8th Cir.), cert. denied 421 U.S. 1002 (1975); United States v. Newman, 490 F.2d 139 (3d Cir. 1974); and United States v. Cardillo, 316 F.2d 505 (2d Cir), cert. denied 375 U.S. 822 (1963). Therefore a writ of certiorari should issue in this case.

B. The trial court improperly refused to inquire of the jurors concerning their exposure to publicity concerning the trial.

As Appendix C which is attached to this petition demonstrates, there was substantial publicity concerning Mr. Raney's trial in local newspapers and on local radio and television. When the extent of this publicity was seen by petitioner, his counsel requested that a mistrial be granted, or that the trial court at least inquire of the jurors whether they had come in contact with any of the news reports. The trial court refused to do either, which was

serious and a very prejudicial error.

The importance of having jurors who have not been influenced by news reports has been recognized for many years. For example, in Crocker v. Justices of the Superior Court, 208 Mass. 162, 178-179, 94 N.E. 369, 376-377 (1911), the highest court of Massachusetts declared:

> There can be no justice in a trial by jurors inflamed by passion, warped by prejudice, and by violence, menaced by the virulence of public opinion or manifestly based by any influences operating either openly or insidiously to such an extent as to poison the judgment and prevent the freedom of fair action. Justice cannot be assured in a trial where other consideration enter the minds of those who are to decide than the single desire to ascertain and declare the truth according to the law and evidence.

It is recognized, of course, that Chief Justice Waite was undoubtedly correct in his observation that in an age "of newspaper enterprise and universal education," all cases of public interest are bound to become fairly common knowledge in the community. Reynolds v. United States, 98 U.S. 145, 155 (1878). However,

there are many cases, including this Court's leading case of Irvin v. Dowd, 366 U.S. 717 (1961), which have recognized that a conviction obtained in the wake of excessive publicity may not stand. This is true whether the crime charged is a capital offense or a simple misdemeanor. Groppie v. Wisconsin, 400 U.S. 505 (1971).

In Irvin v. Dowd, supra, the concurring opinion of Justice Frankfurter acknowledged the difficulty for jurors in reaching a verdict based upon the competent evidence presented at trial "when, before they entered the jury box, their minds were saturated by press and radio . . . " 366 U.S. 717, at 729-730 (Frankfurter, J., concurring). It is even more difficult for a juror to avoid being unduly influenced by publicity concerning a case which occurs during the period when they are sitting as jurors and devoting their full attention

to the case. They are certainly bound to take more notice of any publicity under those circumstances.

Petitioner does not contend in this discussion that he should have been entitled to a jury on which none of the jurors were, at any point related to the proceedings, exposed to any type of publicity concerning his case. It is vigorously contended, however, that when it appeared that an excessive amount of publicity was being generated as a result of his trial, the trial court was required, as a minimum essential of due process of law to inquire of the jurors to determine whether they had been unduly influenced by any of the publicity which had occurred.

Under our system of criminal justice, this Court should not permit even the possibility that a defendant's conviction may have been unduly influenced by the press and broadcast media simply because a trial court refused a

legitimate request that the jurors be polled on the limited issue of their exposure to the publicity.

In allowing this refusal by the trial court to stand, the appellate court has reached a decision that conflicts with the spirit of the decisions of this Court in such cases as Groppie v. Wisconsin, 400 U.S. 505 (1971); Rideau v. Louisiana, 373 U.S. 723 (1963); and Irvin v. Dowd, 366 U.S. 717 (1961). Similarly, the appellate court has sanctioned such a departure on the part of the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

C. Petitioner's sentence includes a punishment for his exercise of his right to trial.

Following petitioner's trial in this action, his co-defendant, Gerald R. Van Diver, was sentenced to one year and two days'

imprisonment and to five years' probation. A few weeks later, John M. Raney was sentenced to ten years' imprisonment. This vast difference in the sentences imposed upon similarly situated defendants reflects the extent to which Mr. Raney has been punished for exercising his absolute right to trial.

Petitioner recognizes that the Constitution does permit qualitative differences in meting out punishment, so that there is no requirement that every person convicted of the same offense receive the same punishment. Williams v. Illinois, 399 U.S. 235 (1970). Still, it is comperative under the Constitution that the fact that a person exercises his right to a jury trial to have no bearing whatever on the sentence imposed. Among the cases reaching this result are: United States v. Derrick, 519 F.2d 1 (6th Cir. 1975); Hess v. United States, 496 F.2d 936 (8th Cir. 1974); United States v.

Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied 411 U.S. 948 (1973); United States v. Hopkins, 150 U.S. App. D.C. 307, 464 F.2d 816 (1972); Baker v. United States, 412 F.2d 1069 (5th Cir. 1969), cert. denied 396 U.S. 1018 (1970); Scott v. United States, 136 U.S. App. D.C. 377, 419 F.2d 264 (1969); and United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

Another recent case to address as similar situation was United States v. Capriola, 537 F.2d 319 (9th Cir. 1976). There, it was held that when the defendants who had gone to trial were sentenced in one case to six years' imprisonment followed by three years of parole, and in another to three years' imprisonment followed by three years of parole, while their co-defendants in a conspiracy to smuggle marijuana had entered guilty pleas and had received sentences ranging from suspended probation to two years'

imprisonment to be served concurrently with other sentences already being served, the trial court was required to reconsider the sentences of those who had stood trial and either ameliorate such sentences or give acceptable reasons for imposing the desparate sentences. The Ninth Circuit Court of Appeals recognized that where there is a substantial disparity in the sentences imposed upon different individuals for engaging in the same criminal activity, the preservation of the appearance of judicial integrity and impartiality require at the very least that the sentencing judge record some acceptable explanation of his reasons therefore.

It is submitted that the Court should impose the same requirement upon the trial court in the present case.

Here, the only remarks which can be considered as reasons for the sentencing are

the following comments made by the trial judge:

> The sentencing is difficult. It's always difficult. In this case I agree with much of what Mr. Noll [defense counsel] said. Some of it I disagree with, and some of it I agreed with. This is not a crime of violence and-- and I take that into account. That's to your credit.
>
> . . . . .
>
> In other words, the thing that I'm thinking about, and I--- Mr. Raney, I--you have been cooperative. Mr. Noll has conducted himself very well during the trial and has-- I couldn't ask for more in that sense, but there is something like three hundred thousand dollars that has been taken away from people in what you might say relatively small amounts. They weren't small amounts to these people, I'm sure.

What was not addressed, though, and should certainly have been addressed, was why, if Mr. Van Diver had also been involved in taking this same $300,000 as Mr. Raney, Mr. Raney should be sentenced to ten times more prison time than was Mr. Van Diver.

Both defendants were similarly situated, being in their early thirties and without a prior criminal history. The only substantial differences was that John Raney chose to exercise

his right to trial while Mr. Van Diver did not stand trial. That difference may not be utilized in determining the sentence to be imposed.

Thus, the affirming of Mr. Raney's sentence by the appellate court conflicts with all of the decisions of this court and of other circuit courts of appeal that have been cited in this discussion. And, once again, the sentence imposed on Mr. Raney constitutes such a significant departure from the accepted and usual course of judicial proceedings, which departure has been sanctioned by the appellate court, that this Court should exercise its power of supervision.

VIII. CONCLUSION

The present case brings before the Court a situation in which the order of the appellate is not only in conflict with decisions of this Court and of other circuit courts, but also has sanctioned such a significant departure from the accepted and usual course of judicial proceedings that this Court should certainly exercise the powers of supervision. This departure is even more pronounced when all of the various aspects

of the case which have been discussed are viewed as a whole.

Petitioner's rights have been so greatly diluted and the procedure employed by the trial court have so completely defeated his right to present a defense that he had no opportunity whatever to receive a fair trial. Therefore, based upon the arguments and authorities in this petition it is respectfully submitted that this petition should be granted.

Respectfully submitted:

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Attorney for Petitioner
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Denver, Colorado 80204
534-5550

PROOF OF SERVICE

STATE OF COLORADO)
CITY AND COUNTY OF DENVER) ss.

I, Louis A. Weltzer, counsel for petitioner, being first duly sworn, depose and say that on December ____, 1979, I served copies of the foregoing petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit by depositing a copy thereof at a United States Post Office, postage prepaid, addressed to the following:

1. Gerald D. Fines
   United States Attorney
   Central District of Illinois
   P.O. Box 375
   Springfield, Illinois 62705

2. Solicitor General
   Department of Justice
   Washington, D.C. 20530

3. John M. Raney
   P.O. Box 2032
   Winter Park, Florida 32790

Louis A. Weltzer

SUBSCRIBED AND SWORN to before me this ____ day of December, 1979.

My commission expires November 30, 1981.

Notary Public

Unpublished Per Curiam Order

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

October 31, 19 79

Before

Hon. LATHAM CASTLE, Senior Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. PHILIP W. TONE, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 79-1323 vs.

JOHN M. RANEY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Springfield Division
No 78-Cr-30028
J. WALDO ACKERMAN, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Springfield Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this court entered this date.

APPENDIX A

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
Argued October 24, 1979

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

October 31, 19 79.

Before

Hon. LATHAM CASTLE, Senior Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. PHILIP W. TONE, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 79-1323 vs.

JOHN M. RANEY,
Defendant-Appellant.

Appeal from the United States District Court for the Central District of Illinois, Springfield Division
No 78-3028
J. Waldo Ackerman, Judge.

ORDER

The defendant, John M. Raney, appeals from the judgment of conviction entered after a jury verdict of guilt on twenty-seven counts of mail fraud, ten counts of wire fraud, two counts of bankruptcy fraud and one count of conspiracy to commit these offenses.

The defendant has raised several arguments on appeal, none of which merits lengthy discussion. The defendant urged most vigorously at oral argument that the evidence of guilt of conspiracy and of the substantive fraud counts was insufficient. In making this argument, the defendant has taken a precarious view of the evidence: on the conspiracy count, the defendant has argued that the chief witness Van Diver's testimony may implicate the defendant but does not show the necessary element of Van Diver's agreement to become a member of the conspiracy. The Government has presented compelling evidence that the defendant was willingly assisted by Van Diver in a scheme to defraud the purchasers of the farm buildings. Both the defendant and Van Diver, for example, sold buildings before forming the corporation. Furthermore, although they put no money into the business, they did take salaries and other expenses during its operation. Van Diver worked with the defendant on a worthless project on Raney's to placate dissatisfied

customers. Both Van Diver and the defendant urged an employee to make partial deliveries to customers to get more money and to make the deliveries at night so the customers could not see what they were getting. As to the fraud counts, the defendant urges us to view the evidence in an altogether different light: according to the defendant, he and Van Diver were business novices whose conduct was foolish, but not criminal. We are satisfied that the evidence, viewed in the light most favorable to the Government, Glasser v. United States, 315 U.S. 60, 80 (1942), supports the jury's finding that the defendant did enter an illegal agreement with Van Diver and that the fate of the defendant's business venture was the product of fraudulent practices. Furthermore, we do not see any fatal inconsistency in the jury's failure to convict on some of the counts. It is settled that the jury may convict on some counts and acquit on other closely related counts. Dunn v. United States, 284 U.S. 390, 394 (1931). This court will not speculate on the reasons for such action. United States v. Elders, 569 F.2d 1020 (7th Cir. 1978).

The defendant's allegation that the evidence against him at trial was the product of his privileged bankruptcy testimony is completely unfounded, as is demonstrated by the November 28, 1978, hearing during which the Government established the lack of opportunity to make any use of the bankruptcy testimony.

The trial court's restriction of cross-examination of Van Diver and Hollis on their subsequent operation of similar businesses was within the court's discretion to prevent questioning that infringes the witnesses' rights against self-incrimination, see United States v. Varelli, 407 F.2d 735, 751 (7th Cir. 1969), cert. denied, 405 U.S. 1040 (1972), and to prevent the trial from becoming a collateral prosecution of the witnesses instead of the defendant. See United States v. Estell, 539 F.2d 697 (10th Cir. 1976), cert. denied, 429 U.S. 982.

Finally, the defendant's sentence was within the limits set by statute. The mere showing that his codefendant pleaded guilty and received a lighter sentence does not raise any question of gross abuse in the sentencing process, particularly in light of the district court's reasons, stated on the record, for imposing the particular sentence on the defendant. See United States v. Santiago, 582 F.2d 1128, 1137 (7th Cir. 1978); United States v. Cardi, 519 F.2d 309, 315 (7th Cir. 1975).

We have considered the defendant's numerous other arguments and hold them to be without merit. In accordance with our ruling from the bench after hearing oral argument, the judgment of the district court is affirmed.

Supreme Court of the United States

No. A-459

JOHN M. RANEY,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 30, 1979.

/s/ John Paul Stevens
Associate Justice of the Supreme Court of the United States

Dated this 29th day of November, 1979.

APPENDIX B

F4

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
-vs-	)	NO. 78-30028
JOHN M. RANEY and GERALD R. VAN DIVER, Defendants.	)	

MOTION FOR MISTRIAL

Now comes John M. Raney, Defendant in the above styled case, by and through appointed counsel, Jon Gray Noll, and moves this Honorable Court to declare a mistrial in the above styled case.

In support thereof, Mr. Raney submits the following:

1. State Journal Register article dated January 16, 1979, a copy of which is attached as Exhibit 1.

2. State Journal Register article dated January 17, 1979, a copy of which is attached as Exhibit 2.

3. State Journal Register article dated January 18, 1979, a copy of which is attached as Exhibit 3.

4. Defendant submits as an offer of proof that the local news, radio, and television media have broadcast information concerning the above styled proceeding substantially similiar to that information which appears in the news articles, Exhibits 1, 2 and 3.

The Defendant submits that this adverse and widespread news publicity has prejudicially affected his defense of the case. It should be noted that one of the basic arguments throughout the case has been the presentation of Mr. VanDiver's plea of guilty. The newspaper articles and radio and television broadcast have set out the terms of Mr. VanDiver's guilty plea. It is the Defendant's contention that Mr. VanDiver's plea of guilty will be imputed to him.

Further, the Defendant requests this Honorable Court to question the respective jurors individually on their knowledge concerning the pre-trial and trial publicity in this case.

APPENDIX C

In the alternative, Defendant moves that this Honorable Court enter an order requiring all news, radio and television media to cease further broadcasts and coverage of this proceeding until a verdict has been returned.

JOHN M. RANEY, Defendant

By Jon Gray Noll
Jon Gray Noll, his attorney

Jon Gray Noll
Attorney for Defendant
608 Ridgely Building
Springfield, Illinois 62701
Telephone: 544-8441

PROOF OF SERVICE

The undersigned hereby certifies that he deposited copies of the foregoing instrument in the U.S. Post Office Box in Springfield, Illinois, with postage fully prepaid and by first class mail, plainly addressed to:

Mr. Thomas W. Turner
Federal Building
Springfield, Illinois 62701

on this 18th day of January, 1979.

Jon Gray Noll

Lincoln, ICG suit postponed

LINCOLN — A hearing on the city's suit against the Illinois Central Gulf Railroad was postponed Monday when the inclement weather prevented the railroad's attorney from appearing in court.

ICG is charged with three counts of violating a city ordinance prohibiting trains from blocking an intersection for more than 10 minutes. City Attorney Warren Peters filed the charges after police observed the alleged violations following numerous citizen complaints.

Robert Gillespie, the ICG attorney, said word he was unable to get from Springfield to Lincoln for the morning bench trial. Logan County Associate Circuit Judge Robert Thornton will hear the case at a future unspecified date.

2 Decatur children die in fire

DECATUR (UPI) — Two children were killed in a fire today at a Near North side home, authorities said.

Deputy Macon County Coroner Margie Mehlin said the victims were not immediately identified but appeared to be 3 or 4 years old.

Four adults were hospitalized with injuries suffered in the blaze. At least two adults jumped to safety from a second floor window, authorities said.

Several firemen were treated for smoke inhalation but none required hospitalization. Two others were slightly injured when the roof of the house collapsed on them.

The house was destroyed, police said.

Methodists set meetings on church mission

Springfield area United Methodist churches are sponsoring "Wake Up to Mission," a series of mission interpretation events in local churches this week.

The program will help church members understand the mission program through personal contact with eight mission workers and 38 other interpreters who have had first-hand experience.

More than 200 different small and large group meetings have been scheduled in area churches during the week.

The program began Saturday with a kickoff banquet at Laurel United Methodist Church in which Dr. Dwight Tuscora, field representative for the [illegible]

Exhibit 1

Ice breaker

City Water, Light and Power crews were confronted with a wet and icy mess Monday after a six-inch water main broke at Seventh Street and Stanford Avenue. The main [illegible] water and the possibility of [illegible] left residents as well as the city's water system.

Building scheme trial may use partner as key witness

The key witness in the trial concerning a steel building sham beginning this week may be Gerald R. Van Diver, 38, who reportedly will testify for the government against his former partner.

Jury selection in U.S. District Court began Monday and will be completed today.

John M. Nancy, 33, formerly of Springfield, faces trial on 61 charges for allegedly selling 120 farmers and small businessmen steel buildings that never materialized.

His associate, Van Diver, also formerly of Springfield, pleaded guilty Dec. 13 to one count of conspiracy and one count of mail fraud and will be sentenced Feb. 2 to one year in jail and five years probation following a negotiated plea with U.S. Attorney Gerald Fines.

Polycon of the 56 counts returned in the indictment against Van Diver, now of Festus, Mo., will be dismissed at the sentencing.

Nancy, of Orlando, Fla., is charged with 43 counts of mail fraud, 13 counts of perjury, four counts of bankruptcy fraud and one count of conspiracy.

His former partner, Gerald R. Van Diver, 38, Festus, Mo., has pleaded guilty to one count of conspiracy and one count of mail fraud for his participation in the scheme. Van Diver has agreed to testify for the government against Nancy.

"The evidence will show," Turner told the court, "that Van Diver and Nancy formed the partnership of Polycon Building Systems to market steel buildings that never materialized.

The scheme netted the two $300,000 from victims in eight states.

Nancy and Van Diver did business from March to September in 1977 as the Illinois Construction Company and Farm Bell Steel Corporation with offices at 501-529 E. Monroe St., authorities said.

Their customers were from Illinois, Iowa, Missouri, Tennessee, Mississippi, Alabama, Arkansas and Nebraska.

The duo allegedly sold steel buildings cheaply, breaking the competition but knowing they could not deliver the goods, according to the indictment.

The buyers made down payments between $2,000 and $3,000 without ever receiving the complete materials for the buildings, the indictment charges.

Authorities believe the trial may last between two and three weeks.

Tom Turner, [illegible] U.S. Attorney, is representing the government with assistance from [illegible] Hankins, assistant U.S. Attorney, and Linda Pence, who is with the fraud division of the U.S. Department of Justice.

Nancy's legal counsel is John Gray Sisk.

Turner said he could not comment on whether they have ever obtained Nancy a negotiated plea.

accused swindler said it's cool as a farmer, jury told

By M. Nancy, who is on trial in U.S. District Court this week for swindling 120 farmers and small businessmen, told one of his employees, "It's easy to fool a farmer."

Assistant U.S. Attorney Tom Turner told jurors Nancy made that statement to Bernie Smith, who was hired by Nancy during alleged approximately $300,000 from victims in eight states, including Illinois.

In opening remarks to the jury Tuesday, Turner traced Nancy's involvement in the scheme that led to his indictment on 61 charges for allegedly selling customers steel buildings that never materialized.

Nancy, 33, formerly of Springfield and now of Orlando, Fla., is charged with 43 counts of mail fraud, 13 counts of bankruptcy fraud and one count of conspiracy.

His former partner, Gerald R. Van Diver, 38, Festus, Mo., has pleaded guilty to one count of conspiracy and one count of mail fraud for his participation in the scheme. Van Diver has agreed to testify for the government against Nancy.

"The evidence will show," Turner told the court, "that Van Diver and Nancy formed the partnership of Polycon Building Systems to market steel buildings that never materialized.

Nancy, of Orlando, Fla., is charged with 43 counts of mail fraud, 13 counts of bankruptcy fraud and one count of conspiracy.

His former partner, Gerald R. Van Diver, 38, Festus, Mo., has pleaded guilty to one count of conspiracy and one count of mail fraud for his participation in the scheme. Van Diver has agreed to testify for the government against Nancy.

"The evidence will show," Turner told the court, "that Van Diver and Nancy formed the partnership of Polycon Building Systems to market steel buildings that never materialized.

Exhibit 2

[illegible] it formed [illegible] with [illegible] [illegible] [illegible]

Supreme Court, U. S.
FILED
JAN 29 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 79-1019

JOHN M. RANEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTARY APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Louis A. Weltzer
Attorney for Petitioner
Weltzer and Worstell
1337 Delaware Street
Denver, Colorado 80204
534-5550

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Unpublished Per Curiam Order
United States Court of Appeals
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 31, 1979

Before

Hon. LATHAM CASTLE, Senior Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOHN M. RANEY, Defendant-Appellant.	Appeal from the United States District Court for the Southern District of Illinois, Springfield Division, No. 78-Cr-30028, J. WALDO ACKERMAN, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Springfield Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this court entered this date.

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued October 24, 1979

October 31, 1979

Before

Hon. LATHAM CASTLE, Senior Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOHN M. RANEY, Defendant-Appellant.	) Appeal from the United States District Court for the Central District of Illinois, Springfield Division. No. 78-30028 J. Waldo Ackerman, Judge.

ORDER

The defendant, John M. Raney, appeals from the judgment of conviction entered after a jury verdict of guilt on twenty-seven counts of mail fraud, ten counts of wire fraud, two counts of bankruptcy fraud, and one count of conspiracy to commit these offenses.

The defendant has raised several arguments on appeal, none of which merits lengthy discussion. The defendant urged most vigorously at oral argument that the evidence of guilt of conspiracy and of the substantive fraud counts was insufficient. In making this argument, the defendant has taken a precarious view of the evidence: on the conspiracy count, the defendant has argued that the chief witness Van Diver's testimony may implicate the defendant but does not show the necessary element of Van Diver's agreement to become a member of the conspiracy. The Government has presented compelling evidence that the defendant was willingly assisted by Van Diver in a scheme to defraud the purchasers of the farm buildings. Both the defendant and Van Diver, for example, sold buildings before forming the corporation. Furthermore, although they put no money into the business, they did take salaries and other expenses during its operation. Van Diver worked with the defendant on a worthless erection manual to placate unsatisfied customers. Both Van Diver and the defendant urged an employee to make partial deliveries to customers to get more money and to make the deliveries at night so the customers could not see what they were getting. As to the fraud counts, the defendant

urges us to view the evidence in an altogether different light: according to the defendant, he and Van Diver were business novices whose conduct was foolish, but not criminal. We are satisfied that the evidence, viewed in the light most favorable to the Government, Glasser v. United States, 315 U.S. 60, 80 (1942), supports the jury's finding that the defendant did enter an illegal agreement with Van Diver and that the fate of the defendant's business venture was the product of fraudulent practices. Furthermore, we do not see any fatal inconsistency in the jury's failure to convict on some of the counts. It is settled that the jury may convict on some counts and acquit on other closely related counts. Dunn v. United States, 284 U.S. 390, 394 (1932). This court will not speculate on the reasons for such action. United States v. Elders, 569 F.2d 1020 (7th Cir. 1978).

The defendant's allegation that the evidence against him at trial was the product of his privileged bankruptcy testimony is completely

unfounded, as is demonstrated by the November 28, 1978, hearing during which the Government established the lack of opportunity to make any use of the bankruptcy testimony.

The trial court's restriction of cross-examination of Van Diver and Hollis on their subsequent operation of similar businesses was within the court's discretion to prevent questioning that infringes the witnesses' rights against self-incrimination, see United States v. Varelli, 407 F.2d 735, 751 (7th Cir. 1969), cert. denied , 405 U.S. 1040 (1972), and to prevent the trial from becoming a collateral prosecution of the witnesses instead of the defendant. See United States v. Estell, 539 F.2d 697 (10th Cir. 1976), cert. denied 429 U.S. 982.

Finally, the defendant's sentence was within the limits set by statute. The mere showing that his codefendant pled guilty and received a lighter sentence does not raise any question of gross abuse in the sentencing process, particularly in light of the district court's reasons, stated on the

record, for imposing the particular sentence on the defendant. See United States v. Santiago, 582 F.2d 1128, 1187 (7th Cir. 1978) United States v. Cardi, 519 F.2d 309, 315 (7th Cir. 1975).

We have considered the defendant's numerous other arguments and hold them to be without merit. In accordance with our ruling from the bench after hearing oral argument, the judgment of the district court is affirmed.

SUPREME COURT OF THE UNITED STATES

No. A-459

JOHN M. RANEY,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 30, 1979.

/s/ John Paul Stevens
Associate Justice of the
Supreme Court of the
United States

Dated this 29th
day of November, 1979.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JOHN M. RANEY and GERALD R. VAN DIVER, Defendants.	)	NO. 78-30028

MOTION FOR MISTRIAL

Now comes John M. Raney, Defendant in the above styled case, by and through appointed counsel, Jon Gray Noll, and moves this Honorable Court to declare a mistrial in the above styled case.

In support thereof, Mr. Raney submits the following:

1. State Journal Register article dated January 16, 1979, a copy of which is attached as Exhibit 1.

2. State Journal Register article dated January 17, 1979, a copy of which is attached as Exhibit 2.

3. State Journal Register article dated January 18, 1979, a copy of which is attached as Exhibit 3.

APPENDIX C

4. Defendant submits as an offer of proof that the local news, radio, and television media have broadcast information concerning the above styled proceeding substantially similiar to that information which appears in the news articles, Exhibits 1, 2 and 3.

The Defendant submits that this adverse and widespread news publicity has prejudicially affected his defense of the case. It should be noted that one of the basic arguments throughout the case has been the presentation of Mr. Van Diver's plea of guilty. The newspaper articles and radio and television broadcast have set out the terms of Mr. Van Diver's guilty plea. It is the Defendant's contention that Mr. Van Diver's plea of guilty will be imputed to him.

Further, the Defendant requests this Honorable Court to question the respective jurors individually on their knowledge concerning the pre-trial and trial publicity in this case.

In the alternative, Defendant moves that this Honorable Court enter an order requiring all news,

radio and television media to cease further broadcasts and coverage of this proceeding until a verdict has been returned.

JOHN M. RANEY, Defendant

By /s/ Jon Gray Noll
Jon Gray Noll, his attorney

Jon Gray Noll
Attorney for Defendant
608 Ridgely Building
Springfield, Illinois 62701
Telephone: 544-8441

PROOF OF SERVICE

The undersigned hereby certifies that he deposited copies of the foregoing instrument in the U.S. Post Office Box in Springfield, Illinois, with postage fully prepaid and by first class mail, plainly addressed to:

Mr. Thomas W. Turner
Federal Building
Springfield, Illinois 62701

on this 18th day of January, 1979.

/s/ Jon Gray Noll

EXHIBIT #1
Page 8 The State Journal-Register, Springfield, Tuesday, January 16, 1979.

BUILDING SCHEME TRIAL MAY
USE PARTNER AS KEY WITNESS

The key witness in the trial concerning a steel building sham beginning this week may be Gerald R. Van Diver, 30, who reportedly will testify for the government against his former partner.

Jury selection in U.S. District Court began Monday and will be completed today.

John M. Raney, 33,formerly of Springfield, faces trial on 61 charges for allegedly selling 120 farmers and small businessmen steel buildings that never materialized.

His associate, Van Diver, also formerly of Springfield, pleaded guilty Dec. 13 to one count of conspiracy and one count of mail fraud and will be sentenced Feb. 2 to one year in jail and five years probation following a negotiated plea with U.S. Attorney Gerald Fines.

Fifty-six of the 58 counts returned in the indictment against Van Diver, now of Festus, Mo.,

will be dismissed at the sentencing.

Raney, of Orlando, Fla., is charged with 43 counts of mail fraud, 13 counts of wire fraud, four counts of bankruptcy fraud and one count of conspiracy.

The scheme netted the two $300,000 from victims in eight states.

Raney and Van Diver did business from March to September in 1977 as the Illinois Construction Company and Farm Belt Steel Corporation with offices at 504-520 E. Monroe St., authorities said.

Their customers were from Illinois, Iowa, Missouri, Tennessee, Mississippi, Alabama, Arkansas and Nebraska.

The duo allegedly sold steel buildings cheaply, beating the competition but knowing they could not deliver the goods, according to the indictments.

The buyers made down payments between $2,000 and $3,000 without ever receiving the complete materials for the buildings, the indictment charges.

Authorities believe the trial may last between

two and three weeks.

Tom Turner, first assistant U.S. Attorney, is representing the government with assistance from Ellen Schanzle-Haskins, assistant U.S. Attorney, and Linda Pence, who is with the fraud division of the U.S. Department of Justice.

Raney's legal counsel is John Gray Noll.

Turner said he could not comment on whether they have ever offered Raney a negotiated plea.

EXHIBIT #2
Page 23 The State Journal Register, Springfield, Wednesday, January 17, 1979.

ACCUSED SWINDLER SAID "IT'S EASY TO FOOL A FARMER; JURY TOLD

John M. Raney, who is on trial in U.S. District Court this week for swindling 120 farmers and small businessmen, told one of his employees "it's easy to fool a farmer."

First Assistant U.S. Attorney, Tom Turner told jurors that Raney made that statement to Bernie Smith, who was hired by Raney during an alleged six-month steel building sham in 1977 that bilked $300,000 from victims in eight states, including Illinois.

In opening remarks to the jury Tuesday, Turner traced Raney's involvement in the scheme that led to his indictment on 61 charges for allegedly selling customers steel buildings that never materialized.

Raney, 33, formerly of Springfield and now of Orlando, Fla., is charged with 43 counts of mail fraud, 13 counts of wire fraud, four counts of bankruptcy fraud and one count of conspiracy.

His former partner, Gerald R. Van Diver, 30, Festus, Mo., has pleaded guilty to one count of conspiracy and one count of mail fraud for his participation in the scheme. Van Diver has agreed to testify for the government against Raney.

"The evidence will show," Turner told the court, "that Van Diver and Raney formed the partnership originally known as Illinois Construction Company and later incorporated as Farm Belt Steel Corporation.

"They sold approximately 120 buildings for sale and erection and six months later, only one building was fully erected, "Turner said.

"Others were partially erected but most customers didn't receive any (buildings) at all." Turner added.

Turner said the two men did not invest any money, consult an attorney or accountant or buy any equipment before starting their business.

They paid each other commissions after they received down payments for the buildings they

sold, but they did so before they delivered the products they advertised, Turner said.

Debra Johnson, a secretary for the corporation before it went bankrupt, testified Tuesday that her bosses, Van Diver and Raney, continued to draw weelky salaries of $1,000 despite facts that the business was doing poorly and they could not pay employee salaries.

"Mr. Raney conducted business as if it were a roaring success. It was for him-because he was getting paid $1,000 a week," Turner said.

The trial continues today and authorities expect it to continue for at least two weeks.

EXHIBIT #3
Page 3 The State Journal Register, Springfield, Thursday, January 18, 1979.

PARTNER IN ALLEGED SWINDLE SAYS HE OBJECTED TO TACTICS

Gerald Van Diver testified in federal court Wednesday that when he objected to his partner's business tactics during their 1977 steel building sham, his associate John M. Raney reportedly said, "This is the way to start a business."

"It's easier to use other people's money than to use your own," Raney, 33,told Van Diver, who testified that he disapproved of selling the buildings and promising construction before the men had either buildings to sell or a construction crew.

Van Diver, 30, formerly of Springfield and now of Festus, Mo., is the prosecution's prime witness in the case against Raney, who is charged with swindling $300,000 from residents in eight states, including Illinois.

Van Diver Wednesday testified that entrepreneur Raney, formerly of Springfield and now of Orlando, Fla., apparently conned him as well as 120 farmers

and small businessmen.

Raney was indicted on 61 charges: 43 counts of mail fraud, 13 counts of wire fraud, four counts of bankruptcy fraud and one count of conspiracy.

Van Diver was indicted on 58 counts returned in the same indictment. He pleaded guilty to one count of conspiracy and one count of mail fraud in a negotiated plea with the government that will get him a sentence of one year in prison and five years probation.

Van Diver testified that the men met when Van Diver had applied in St. Louis for a sales job with a steel building company.

Raney, who was sales supervisor for the company, hired Van Diver and about one month later asked him to work for a steel construction company that Raney planned to start.

Van Diver, who had worked as an advance man for President Gerald Ford in Missouri in the last presidential election, told the court he had no sales or construction experience before Raney hired him.

Raney told Van Diver he wanted to sell and erect steel buildings. Van Diver took the job and, before they quite the St. Louis company, they began attracting customers for their own enterprise, according to testimony.

They formed Illinois Construction Company and later incorporated as Farm Belt Steel Corporation with offices in Springfield.

According to Van Diver, the corporation was a company in name only. Although Van Diver did eventually try to fill the orders placed and paid for by customers, he did so without Raney's blessings or help, testimony indicated.

"We never had discussed about how much was needed to invest to get started," Van Diver told the jurors. "He (Raney) just told me he had enough to get started."

The two men never did invest any of their money when they sold the bogus buildings, Van Diver testified, although they did take weekly salaries as high as $1,000 from the down payments given to them.

The partners advertised in newspapers and brochures that they had pre-fabricated engineered steel buildings to sell. And they promised they would also erect the buildings they sold.

"Raney told them it was basically easy to erect quality buildings, and after quite a bit of pressure, they put down checks for the down payments, "Van Diver said.

Van Diver said he and Raney continued to solicit and accept down payments for buildings, although they could not produce the products they promised.

As time went on, however, Van Diver said he tried to make the company legitimate by ordering buildings from steel suppliers to fulfill some of the orders.

The corporation eventually put construction crews on the payroll, also, although customers said they were young and inexperienced.

The two bought an old garage in Mount Auburn and set up a mock factory with a welder, an acetylene torch and rented a fork lift that was returned after about one month of use.

Potential customers were invited to an open house at the factory, where parts for the steel buildings allegedly were being manufactured.

"We manufactured some columns for buildings but we never fabricated a full frame, "Van Diver said when questioned by Tom Turner, first assistant U.S. attorney.

"I told him (Raney), 'You lied to those people' (after making a sale). And then Raney made another sale after he promised he would not make any more sales without making more commitments for steel suppliers," Van Diver said.

Van Diver testified he was the bookkeeper when the corporation began, but when he demanded Raney account for his business expenses, Raney took the accounting duties away from him.

"He told me I was prying and it was none of my damn business. And then I was told by Raney he had hired a bookkeeper, Van Diver explained. But Raney never did, Van Diver said.

Van Diver will return to federal court today as a witness.

Supreme Court, U. S.
FILED
FEB 23 1980
MICHAEL RODAK, JR., CLERK

No. 79-1019

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN M. RANEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

CAROLYN L. GAINES
Attorney
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1019

JOHN M. RANEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment and order of the court of appeals (Pet. App. A) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1979. Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to December 30, 1979 (Pet. App. B), and the petition was filed on December 29, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in limiting cross-examination.

2. Whether the district court erred in not questioning the jury about newspaper articles published during petitioner's trial.

3. Whether the record indicates that petitioner's sentence was enhanced because he stood trial.

STATEMENT

Following a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted on 27 counts of mail fraud, in violation of 18 U.S.C. 1341, 10 counts of wire fraud, in violation of 18 U.S.C. 1343, two counts of bankruptcy fraud, in violation of 18 U.S.C. 152, and one count of conspiracy, in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of five years' imprisonment on the mail fraud, bankruptcy fraud and conspiracy counts, and concurrent terms of five years' imprisonment on the wire fraud counts to be served consecutively to the sentence imposed for mail fraud. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner, while employed by Agra Steel Company, hired Gerald Van Diver for a sales job (Tr. 298).[1] Shortly thereafter, petitioner invited Agra employees, including Van Diver, to join him in a new venture selling and constructing steel buildings. Van Diver accepted (Tr. 303-304).

Before leaving Agra, petitioner entered into a contract on behalf of the new company, Illinois Construction Company-Farm Belt Steel (ICC-Farm Belt), to erect a steel building even though he had neither capital, equipment, nor an erection crew (Tr. 304-311, 1087-1089). The contract required a down payment of one-

[1]Van Diver, who was indicted as a co-defendant, pleaded guilty to conspiracy and mail fraud and testified as a government witness.

third of the total contract price, another one-third when building materials were delivered, and the final one-third upon completion of the building (Tr. 319). Subsequent sales contracts included similar provisions (Tr. 234-235). Customers were told that ICC-Farm Belt had been in business for 25 years in other locations, that its buildings were pre-engineered and mass produced (Tr. 1417-1418), and that the buildings were easy to erect and could be completed in three to four days (Tr. 370-371). ICC-Farm Belt buildings were sold at prices considerably below those of competitors, and in fact below prices customarily paid by dealers (Tr. 19, 1028, 1042, 1375).

Approximately 10 days after the initial down payment was received on a contract, ICC-Farm Belt sent a thank-you letter informing the customer that the company would be calling in seven to ten days to confirm a delivery date for the building. The letter included an offer to sell customers a new product—solar energy heating panels—even though the company had no such product to sell. After receiving the thank-you letter, some customers never heard again from the company (Tr. 21-22, 56-57, 761). Other customers received partial delivery of materials, but not within the time period promised (Tr. 23, 226, 1223-1224, 1430-1431).

ICC-Farm Belt contracted to build 120 buildings from March through August 1977 and collected more than $300,000 in down payments (Tr. 1493-1501). However, the company completely erected only one building and partially erected two others (Tr. 470, 787).

On September 7, 1977, the company filed a bankruptcy petition. One week prior to filing, petitioner opened a new company bank account with a $2,000 down payment check and wrote two checks on that account, one for

$683 payable to John Bingaman and one for $1,251 payable to Bernie Smith. Bingaman and Smith cashed the checks and returned the proceeds to petitioner. At that time, the regular ICC-Farm Belt checking account was overdrawn by $1,207 (Tr. 1277, 1393-1394, 1434-1440, 1507-1509, 1537).

ARGUMENT

1. Petitioner contends (Pet. 12-17) that the district court erred in limiting cross-examination of government witnesses Van Diver and Richard Hollis concerning their subsequent business ventures. He maintains that this evidence was crucial to his defense because it would have shown similar wrongful acts from which the jury could have determined Van Diver's or Hollis' culpability in the instant case. This claim was properly rejected by the court below.

At trial, defense counsel argued that the government should not be permitted to bring out the fact that Van Diver had pleaded guilty to any of the charges in the indictment. The government agreed not to elicit such testimony if defense counsel also agreed not to elicit it. Defense counsel responded that the whole purpose of his motion was to make certain that the guilty plea was not mentioned (Tr. 190).

Since petitioner decided as a matter of trial strategy to exclude the most probative evidence of Van Diver's culpability in the present scheme, namely his guilty plea, petitioner has no cause to complain of the restrictions on cross-examination. Nor would proof of the witnesses' subsequent business transactions, assuming they constituted "bad acts," have been probative of petitioner's innocence in the present scheme. See *United States* v. *Estell*, 539 F. 2d 697 (10th Cir.), cert. denied, 429 U.S. 982 (1976); *United States* v. *Dalton*, 465 F. 2d 32 (5th Cir.), cert. denied, 409 U.S. 1062 (1972). As the court of appeals correctly noted (Pet. App. A3):

> The trial court's restriction of cross-examination of Van Diver and Hollis on their subsequent operation of similar businesses was within the court's discretion to prevent questioning that infringes the witnesses' rights against self-incrimination, *see United States* v. *Varelli*, 407 F. 2d 735, 751 (7th Cir. 1969), *cert. denied*, 405 U.S. 1040 (1971), and to prevent the trial from becoming a collateral prosecution of the witnesses instead of the defendant. See *United States* v. *Estell*, 539 F. 2d 697 (10th Cir. 1976), *cert. denied*, 429 U.S. 982.

Thus the district court's ruling properly narrowed the scope of cross-examination on tangential matters without abridging petitioner's right to confront the witnesses against him and to present a defense.

2. Petitioner further contends (Pet. 17-21) that the district court erred in refusing to inquire of the jurors whether they had been exposed to publicity concerning the trial. This claim rests on a faulty reading of the record and, in any event, is frivolous.

Early in the trial, defense counsel moved for a mistrial based on trial publicity and requested in addition that the court, in counsel's presence, question the jurors individually about what they had seen or heard (Tr. 377-380). In response, the trial judge addressed the following inquiry to the jury as a whole: "[H]ave any of you * * * read or heard about the case on TV, radio, newspapers or anything like that? If anybody has, I should talk to you about what you may have seen" (Tr. 381). One juror stated that he had seen a television story

following the first day of trial, but that it had not reported on the testimony (*ibid.*). The judge then admonished the jury not to read or listen to any publicity about the case (Tr. 382). He repeated the admonition on each of the succeeding eight days of trial (Tr. 707, 859, 1081, 1272, 1480, 1646, 1663, 1672).

Thus, the court did in fact inquire whether the jury had been exposed to prejudicial publicity and concluded that it had not (Tr. 383-384).[2] Therefore, petitioner's quarrel is limited to the court's refusal to interrogate the jurors individually and to the court's denial of his mistrial motion. Under the circumstances, the court can hardly be said to have thereby abused its discretion. See *Holt* v. *United States*, 218 U.S. 245, 251 (1910); cf. *Marshall* v. *United States*, 360 U.S. 310 (1959).

3. Finally, petitioner argues (Pet. 21-26) that his total sentence of ten years was an unduly harsh sentence compared to that imposed on Van Diver, who pleaded guilty and received a sentence of one year and two days' imprisonment to be followed by five years' probation.[3] Petitioner concludes that he was penalized for standing trial. The evidence, however, indicates that petitioner was far more culpable than Van Diver. The venture was petitioner's idea; furthermore, petitioner was president of the company and personally carried out many of the company's fradulent practices. At sentencing, the judge's remarks focused on the impact of the fraud and did not

[2]That conclusion would have been valid even if the jury had paid attention to the publicity. The articles that appeared in local newspapers (Pet. App. C3-C5) simply reflected accurately what had transpired in the court and contained no prejudicial, inflammatory, or inadmissible information.

[3]The terms of Van Diver's sentence were fixed under a plea agreement approved by the court.

suggest even remotely that petitioner was being penalized for exercising his right to a trial (March 21, 1979 Tr. 22-24). In these circumstances, the district court did not abuse its discretion in imposing a sentence within the limits set by statute. See *United States* v. *Tucker*, 404 U.S. 443, 447 (1972); *United States* v. *Santiago*, 582 F. 2d 1128 (7th Cir. 1978); *United States* v. *Cardi*, 519 F. 2d 309 (7th Cir. 1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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